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DISTRICT OF UTAH

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IN THE UNITED STATES COURT FOR THE DISTRICT OF UTAH  
CENTRAL DIVISION

PHILLIP M. ADAMS, an individual, and  
PHILLIP M. ADAMS & ASSOCIATES,  
LLC, a Utah Limited Liability Company,

Plaintiffs,

vs.

GATEWAY, INC., f/k/a GATEWAY 2000,  
INC., a Delaware corporation,

Defendant.

MEMORANDUM ORDER  
DENYING GATEWAY'S  
EXPEDITED MOTION FOR STAY  
OF ORDER GRANTING  
PLAINTIFFS' MOTION TO  
COMPEL PRODUCTION OF  
DOCUMENTS WITHHELD ON THE  
BASIS OF PRIVILEGE

Case No. 2:02-CV-106 TS

This matter is before the court on defendant Gateway's Expedited Motion for Stay of Order Granting Plaintiffs' Motion to Compel Production of Documents Withheld on the Basis of Privilege (Motion to Stay). This is a patent case and for many months the parties have been engaged in extensive and on-going discovery disputes before the Magistrate Judge. On December 15, 2003, Magistrate Judge Nuffer issued an Order Granting

148

Plaintiffs' Motion to Compel Production of Documents Improperly Withheld on the Basis of Privilege (Order).<sup>1</sup> Defendant Gateway filed a timely objection to that Order and seeks to stay provisions of that order pending resolution of its Objections.

The Gateway documents at issue are the nearly 1,000 documents sought by Plaintiffs (hereinafter Adams), for which Defendant has claimed a blanket "attorney-client / work product privilege" because they were generated as part of an investigation "initiated and supervised" by its legal department. Order, at 1 and Gateway's Objection, at 1. The Order comprehensively summarizes the basis of Gateway's claims of privilege, surveys the law regarding Gateway's claims of privilege, sets forth the standards to be applied to those claims and applies those standards to the small sampling of the disputed documents that Gateway has produced for judicial review. Among other things, the Order requires Gateway to do the following:

IT IS FURTHER ORDERED that Gateway shall, consistent with the standards set forth in this order, re-evaluate its privilege claims as to the documents now listed on its privilege logs.

IT IS FURTHER ORDERED that Gateway will produce on or before January 5, 2004,

- a. to Adams, all documents as to which Gateway no longer claims privilege;
- b. to the court, two copies of all [of the sample of] documents as to which this order denies privilege protection, including, to

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<sup>1</sup>The Order is filed under seal. On December 30, 2003, a redacted and unsealed version of the same Order was filed. This court's citations herein are to the redacted version.

the extent not produced under subparagraph a., [listed documents in whole or redacted form];

c. to the court, two copies of all remaining documents as to which Gateway believes it is entitled to claim privilege under the terms of this order, with any narrative argument. A redacted copy of the argument should be simultaneously provided to Adams' counsel; and

d. to the court and Adams, a list of all documents in each of the foregoing categories, with a complete description of the documents, so that the list of documents compiled under subparagraph c. is a sufficient privilege log.

The second copy of the documents listed in subparagraph b. will be available for Adams' counsel to retrieve from the court when this order is no longer subject to objection before the district judge. The magistrate judge will review the documents listed in subparagraph c. and issue a later ruling thereon.

Order, at 46-47.

The Order noted that "to ensure that this already lengthy process is not further prolonged," the January 5 deadline was firm unless a formal stay was obtained. *Id.* at 46, n. 1111. Judge Nuffer subsequently reminded the parties of the procedures for obtaining a stay and noted that the court would be closed for two days for the New Year's holiday. Adams' Opposition to Motion to Stay, Ex. A (Judge Nuffer's December 23, 2003, e-mail to counsel).

Pursuant to DuCivR.74-1(b), Gateway initially filed its Motion to Stay with Judge Nuffer on December 29, 2003. He denied it the same day. Later on December 29, 2003, Gateway filed the present Expedited Motion to Stay. The Motions to Stay filed in this court noted that the deadline for filing Gateway's objections to the Order was December 30,

2003. However, Gateway represented that it was filing its Motion to Stay prior to filing its objections because of the upcoming 2-day holiday court closure. On December 30, 2003, Gateway filed its Objections to the Order and on the same day Adams filed its Opposition to the Motion to Stay.

On the morning of December 31, 2003, counsel were notified by telephone that this court was denying the Motion to Stay and that this written order would follow.

Gateway seeks to stay subsections (a), (c) and (d), of the Order, reproduced above, pending resolution of its objections. Gateway accurately characterizes those subsections of the Order as requiring it to reassess, sort, and submit a revised list of the disputed documents for which it claims a privilege, such list to include any narrative legal argument in support of any continuing claim of privilege. Gateway does not claim it would suffer any irreparable harm if the Order is not stayed. Instead, it claims that the required sorting and listing efforts will be "substantial work" that may be "wasted" if this court finds its objections have merit. Thus, it argues that the Order's required sorting, listing and production are "unnecessary" until the objections are ruled upon.

In opposition, Adams contends that Gateway will not be prejudiced by complying with subparagraphs (a), (c) and (d), because the Order provides that no purportedly privileged documents can be released until after this court rules on Gateway's objections. Adams further contends that Gateway's Motion to Stay is merely a delaying tactic.

The parties have not cited, and the court was unable to locate, any standard specific to consideration of a motion to stay an order of a magistrate judge pending resolution of

an appeal by objections filed with the district court. There are standards for staying discovery pending resolution of a potentially dispositive motion, see *Feldman v. Flood*, 176 F.R.D. 651, (M.D. Fla. 1997) and for staying an order pending appeal to the circuit court:

To obtain a stay pending appeal, 10th Cir. R. 8.1 requires an applicant to address the following four factors: (1) the likelihood of success on appeal; (2) the threat of irreparable harm if the stay is not granted; (3) the absence of harm to opposing parties if the stay is granted; and (4) any risk of harm to the public interest.

*Spain v. Podrebarac*, 68 F.3d 1246, 1247 (10<sup>th</sup> Cir. 1995); Fed. R. App. P. 8 (same).

The court has considered the Motion to Stay, Adams' Opposition, the Order, and Gateway's Objection and is mindful of the deference to be given to a magistrate judge's rulings on discovery matters.<sup>2</sup> It is not necessary for the court to determine what specific standard applies because, under any standard, Gateway has not shown that a stay is necessary to protect its interests because no disputed documents will be turned over until after its objections have been resolved. Gateway has not only not alleged any irreparable harm, it has not even shown it is unduly burdensome for it to comply with the Order and re-evaluate, sort, and submit a revised list of the documents for which it claims a privilege for review and to turn over only those documents in which it no longer claims a privilege.

Further, it appears that this discovery dispute is still in process before the Magistrate Judge. Judge Nuffer has outlined for the parties the standards he will apply. However, he has been able to apply those standards to only the very few of the set of nearly 1,000

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<sup>2</sup>See 28 U.S.C. § 636(b)(1)(A) (magistrate judge's rulings on non-dispositive pretrial matters subject to "clearly erroneous or contrary to law" standard of review).

disputed documents at issue which have been made available to him. When this court considers the objections, it will be helpful to have the parties address whether the court should consider the current objections, which apply to a very small fraction of the disputed set of documents, or if it would be more efficient to consider the matter after all claims of privilege in all of this set of disputed documents have been evaluated by the Magistrate Judge. The required revised and detailed privilege log and narrative would be relevant to this court's consideration of that issue.

Finally, it is in the interest of the parties and the court to avoid any further delay in resolving this discovery dispute. The re-sorting and production to the Magistrate Judge facilitates his consideration of the remaining bulk of the disputed documents pending resolution of the current objections to his Order. It is therefore

ORDERED that defendant Gateway's Expedited Motion for Stay of Order Granting Plaintiffs' Motion to Compel Production of Documents Withheld on the Basis of Privilege is DENIED.

DATED this 5<sup>th</sup> day of January, 2004.

BY THE COURT:



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TED STEWART  
United States District Judge

United States District Court  
for the  
District of Utah  
January 5, 2004

\* \* CERTIFICATE OF SERVICE OF CLERK \* \*

Re: 2:02-cv-00106

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